174 (2)

Supreme Court
OCT 29 2010
OFFICE OF THE CLERK

NO. 10-65

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN KEITH HARPER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

Michael P. Heiskell
Counsel of Record
Johnson, Vaughn & Heiskell
5601 Bridge Street, Suite 220
Fort Worth, Texas 76112
(817) 457-2999 Office
E-mail: mheiskell@johnson-vaughn-heiskell.com

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS. i

TABLE OF AUTHORITIES. ii

GROUNDS FOR REHEARING. 1

THE FACTS. 2

THE MISUNDERSTANDING. 3

MISJUDGING DISCRETION. 5

FRE 701: OPINIONS ARE FACTS
ARE EXPLOITED. 7

RULING WITHOUT DETAILS. 8

COMPOUNDING ERRORS. 9

CONCLUSION. 12

CERTIFICATE OF COUNSEL. 14

TABLE OF AUTHORITIES

Cases — Page(s)

Carlisle v. United States,
517 U. S. 416, 426. 1

Kumho Tire Co. v. Carmichael,
526 U.S. 137, 141 (1999). 2, 6, 13

Marshall v. United States,
360 U.S. 310 (1959). 12

Roper v. Beto, 454 F. 2d 499, 502 (5th cir. 1972)
(quoting Simmons v. United States,
390 U.S. 377, 384 (1968). 5

United States v. Figueroa-Lopez
125 F3d 1241 (9th Cir 1997). 8

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006). 7

United States v. Ladd,
527 F.2d 1341 (5th Cir. 1976).. 10

United States v. Lampton,
158 F.3d 251 (5th Cir. 1998). 10

United States v. Sanchez-Sotelo,
8 F3d 202 (5th Cir 1993) 8

United States v. Tomblin,
46 F.3d 1369,1389 (5th Cir. 1995). 10

United States v. Vega,
860 F2d 779 (CA7 1989). 8

Federal Rules of Evidence

Federal Rule of Evidence ("FRE") 701. . . . . 1, 5, 8, 13

Federal Rule of Evidence ("FRE") 702. . . . . 2, 6, 13

Federal Rule of Evidence ("FRE") 901(b)(5) 2

GROUNDS FOR REHEARING

Petitioner stands humbly before you, arms waving in the air. With all due respect, what we have here is a failure to communicate. 58 seconds into listening to Exhibit 19[1] in this case, and you would understand completely why it is impossible to make a voice identification from this push-to-talk Nextel (it is ***not*** a cell phone; it is a radio-band "burner"). Why this distinction matters is the snagged thread that unravels the entire case. This identification-testimony was the lynchpin of the case. If the prosecution had a valid case against this Petitioner, they would not have put an agent on the stand to make a last-minute ID from an indecipherable tape-recorded contact. The appellate court gave no indication of a familiarity with the sounds on the Exhibit 19[2].

There is chaos in the Circuits on the admission of layperson testimony under Fed. Rules of Evidence Sec. 701 ("FRE 701"). This Honorable Court has supervisory authority over the federal courts to prescribe binding rules of evidence and

---

[1] Unless otherwise specified, all exhibits, page numbers and line numbers refer to the trial court evidence and transcript.

[2] The contacts (erroneously referred to as "phone conversations") lasted the following minutes and seconds: 2.44, 1.28, 1.27, 1.19. The responses by the call-recipient can be heard in sporadic one-second blasts of static, or not at all. But the call-recipient's "voice" per se, is *never* heard.

procedure. Carlisle v. United States, 517 U. S. 416, 426. This matter contains an issue of great importance to all the Circuits much the same as Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) did with regard to FRE 702.

THE FACTS

The simplified fact scenario is a drug distribution ring busted and several individuals caught in the act; one of whom made four brief DEA-arranged "phone calls" (sic) to the alleged major-player distributor which were audio-taped.

During the 4 push-to-talk Nextel contacts, the indecipherable words of the call-recipient-speaker can be heard in one-second blasts of static.

The deal-making arrestee offered up Petitioner's name to go along with the one-second blasts of static, which name the agent quickly researched[3] and which resulted in this Petitioner's arrest two weeks later in Tennessee[4].

The Petitioner was then interviewed by Agent York who had overheard the terse push-to-talk contacts. Petitioner's home and business were searched from which no incriminating evidence was

---

[3]The testimony at issue was not offered nor admitted under FRE 901(b)(5), nor did the appellate court make reference to that code section. Thus, for purposes of Petitioner's Rehearing request, that code section is not discussed.

[4]Testimony of Agent York: Page 313 lines 8 to 13 "Q. Now after these phone calls, interactions between Brian Keith

found.

There was no mention of any phone-voice identification, and the caller- recipient's matching push-to-talk Nextel was never recovered.

The photograph of an unknown individual was kept in evidence for a year apparently thought to be the Petitioner or the distributor that spoke on the push-to-talk Nextel[5].

The deal-making conspirator's credibility became severely questioned in the case[6] (he was unable to identify the petitioner) and suddenly the DEA agent was called upon to identify Petitioner based on the push-to-talk Nextel static[7].

THE MISUNDERSTANDING

There was a fundamental misunderstanding of the evidence in the appellate court's ruling. The term "cell phone" has been used to describe the technologically inferior push-to-talk Nextel walkie-talkie as though they are the same or even similar technology. They are not. Only through listening to

---

[5] Page 356 line 15 to 357 line 21 for one example.

[6]Page 10 of the appellate court's decision, "On the day before trial, Harper's attorney discovered that Savage had made calls from a state jail, which had been recorded by the phone company, that exculpated another codefendant."

[7] Agent York testified repeatedly to the accuracy of the sounds/static on the tape-recording and the lack of any attempt to clean up the audio i.e., page 358 line 13 to 359 line 19.

Exhibit 19 can you understand the difference. The appellate court repeatedly used the term "cellular phone" and clearly understood it to be such. It was not. **Other than using the misleading words, "cell phone," and "phone call" we don't have words in English to accurately portray this Nextel object and these radio transmissions.**

The written transcript leads to the false impression that Exhibit 19 contains a normal everyday tape recording of a cell phone conversation. And this is obviously what the Fifth Circuit understood from the natural meaning of the words from the transcript[8]. But anyone who has been in the military, in a police unit or played with a walkie-talkie as a child would recognize the type of "blast of static" that takes the form of a word to be deciphered. But it is ***not*** a "voice" per se on the other end of the walkie-talkie Nextel.

A year after the arrest, at the jury trial, Agent York was suddenly used to testify that he identified the Petitioner's voice at the in-person interview two weeks after the push-to-talk Nextel contacts were made. The testimony is not just improbable, it is impossible. There is no way to understand this impossibility without listening to the actual Exhibit 19 (as opposed to just reading the agent's personal transcripts marked Exhibits 20 to 23).

---

[8] In the appellate court's rendition of the facts, they stated, "After Savage agreed to try to contact Harper, the agents retrieved a ***cellular telephone*** that Harper had given to Savage..." (emphasis added)

The appellate court rendered a ruling upholding admissibility of the recording and voice identification based on the natural misunderstanding of the modes of communication. The push-to-talk Nextel is not a cell phone (in the movies/TV, it is perhaps called a "burner" --a throwaway inferior one-signal radio-type object) and you don't dial a phone number, you push a button to buzz the single party connected to the matching device. Please see page 310 Line 24 to 311 line 1 to 5 as well. (A Nextel representative testified beginning at page 460, line 22.)

The first 58 seconds[9] of Exhibit 19 from the trial court shows the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Roper v. Beto, 454 F. 2d 499, 502 (5th cir. 1972) (quoting Simmons v. United States, 390 U.S. 377, 384 (1968).

This would not have happened if the trial court had been required to exercise discretion on the record rather than just admitting the evidence automatically.

MISJUDGING DISCRETION

The trial court & appellate court each ruled that the testimony was properly admitted as layperson opinion under FRE 701, but even if it were

[9]The use of the "58 seconds" is not to mislead the Court, but to accentuate that in less than a minute, one could understand the decisive issue here.

true that a layperson is *permitted* to testify to voice identification, that should never be interpreted as meaning that he *should* or *must*. It is clear from the record that the trial judge believed he had no choice -- that if it was offered as layperson opinion, the judge *must* allow it to go to the weight, not the admissibility.

The appellate court's ruling on this issue likewise referenced only the general proposition that a person ***can*** make an ID from a 'phone call' therefore they found no abuse of discretion. These "gatekeeper" issues cross-over in small part with the issues determinative in Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (granting certiorari to clarify trial judge's "gate-keeping" obligation regarding expert testimony under Fre 702--courts of appeals are to apply 'abuse of discretion' standard when reviewing district court's reliability determination.) Upon listening to the recording (Exhibit 19), it is clear the District Court's decision in this case, to admit layperson ID-testimony, was an abuse of discretion and therefore unlawful and a denial of due process.

The appellate court completely overlooked whether admissibility was appropriate under *these* facts--which is ***not*** to say this issue is fact-specific, because the 'gatekeeper' use of discretion should be **a universal rule**.

The agent translated the "drug code words" in this case not just because of the meaning of the words, but because *no person could have identified the words of static to begin with*. Yet this issue goes

one important giant step further -- not just a.) translation of the words that were formed, or b.) the meaning of the words, but whether you could hear c.) a "***voice***" to be identified with a human.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence" as reiterated in United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). When a trial court rules that admissibility is "automatic" (by refusing objections as going to the "weight of the evidence, not the admissibility") it deprives the Petitioner of the right to have his attorney argue a legitimate point of law, thus essentially depriving Petitioner of the right to an attorney's argument and representation in court.

OPINIONS ARE FACTS, AND EXPLOITED

The agent's testimony of the push-to-talk contacts was allowed over objection, it was promised to be an opinion, but the testimony was stated as a fact and the opinion was abused. Just two examples, page 296 line 13 to 15: "I recognized the voice when I spoke with him...as being the same voice that was on that recorded telephone call that Mr. Savage made..." (It's stated as a 'fact.') And, page 310 line 22 & 23 Agent York: "it's my opinion Mr. Harper is a seasoned experienced drug-trafficker." (This is poisoning of the jury.) Minutes later the 'fact' was reinforced by the agent's testimony that a judge had forfeited Petitioner's property because Petitioner was

in fact the culprit. (Please see Page 316 lines 16 to page 317 line 3.) Further usurping the jury's role[10] in this case. United States v. Sanchez-Sotelo, 8 F3d 202 (5th Cir 1993)--an officer may not "translate" taped conversations where the officer's opinion went well beyond the plain meaning of the tape; Rule 701 should be applied in a manner that *allows the jury to draw it's own conclusions.* But this is not how it works in practice without a universal rule from this Supreme Court requiring use of the trial court's discretion. (Here, the prosecutor later bolstered the layperson-agent's "expertness" in the area of "phone"-voice identification and the agent was inexplicably deemed an expert on reading computer screens at page 615.) Holding in conflict, United States v. Vega, 860 F2d 779 (CA7 1989); 27 Fed Rules Evid Serv 561. The United States v. Figueroa-Lopez 125 F3d 1241 (9th Cir 1997) court noted the dangers of the government's blurring the line between expert & lay witnesses.

RULING WITHOUT DETAILS

When the appellate court ruled on the FRE 701 issue[11], they did not indicate a familiarity with

---

[10]Page 380 at lines 1 to 4, another of many examples of usurping, where Agent York told the jury, "I believe I've done the best possible job that I know how. I've collected all the evidence that I feel is sufficient to what I feel prove Mr. Harper guilty of this crime. I feel like I've done the best job I can do." The record is silent as to any emotion in his voice.

[11] The end of page 22 and page 23 of the unpublished Opinion of the Court of Appeals for the Fifth Circuit in United States v.

the 'phone' call in *this* case (perhaps relying solely on the trial transcript and Exhibits 20 to 23, the agent's written rendition). Listening to less than a minute of the CD would make it clear that the positive-ID testimony is wishful thinking and irreparably prejudicial so that it should not have been permitted. (There's a reason why the agent transcribed the tapes himself -- page Page 301 lines 22 & 23--no secretary or assistant could have understood it.)

Not only did the appellate court misapprehend the evidence, but the trial court ruled on the admissibility prior to ever hearing the recording. On page 300 at line 25 of the transcript, *the court explicitly indicates that no "judge's discretion" is involved* -- "Okay, your objection is overruled. I think it goes to the weight, not the admissibility...." The trial judge knew absolutely nothing about the sounds on the tape when this ruling was announced. This record is rife with issues upon which to render a ruling helpful and instructive to all Circuits. More importantly for Petitioner (and intriguing for the reader) the record itself suggests who the true culprit may have been--but clearly, the record does not support a conviction of the man imprisoned from these facts.

COMPOUNDING ERRORS

The appellate court stated that the prosecutor's words "give us some pause" and "We are

---

Harper, 2010 WL 816836 (5th Cir., 3/9/10) Before Clement, Prado and Elrod, Circuit Judges.)

somewhat troubled by the prosecutor's use..." The appellate court's conclusion that even if the prosecutor used impermissible behavior it wasn't prejudicial *rests on a false premise.* That false premise being that the ID is valid and admissible, when in fact, the ID is unsustainable.

The prosecutor admonished the judge in front of the jury, "...but I just note for the court that there is case law that supports lay-witness identification of voice and that this is perfectly admissible, as the court has ruled." If she is referring to the two cases cited by the appellate court[12], one case had thousands of recordings and the other case had video/audio tapes--and both had to do with *telephones.* They could not be more distinguishable from the facts at hand in this case. (Not to mention the prejudicial effect that her mini-lecture to the court had on the jury.)

The appellate court was silent on the sufficiency of the evidence in this case. The Fifth Circuit made the statement that there are 3 points to assess in determining whether the prosecutor's improper statements were prejudicial. The third of these points would have been "the strength of the evidence of the Petitioner's guilt.[13]" The court

---

[12]United States v. Ladd, 527 F.2d 1341, 1343 (5th Cir. 1976); United States v. Lampton, 158 F.3d 251, 259 (5th Cir. 1998)

[13]Page 24 of the appellate court's decision: "and (3) the strength of the evidence of the defendant's guilt. *Id.* at 415 (quoting United States v. Tomblin, 46 F.3d 1369,1389 (5th Cir. 1995))." But they remained silent on this third prong even after finding potential prejudice.

analyzed their first two points and concluded without any reference to the third. The fact that the court never referenced the sufficiency, quality or strength of the evidence against Petitioner speaks volumes. This indicates the substantial nature of the grounds for Rehearing[14].

If this Honorable Court were to grant the rehearing there is no possibility of regret because of the number, and significance, of issues to *all* the circuits (and the impact on this cruel conviction).
The record gives clues as to the true culprit. On the audiotapes, the deal-making arrestee repeatedly called the call-recipient "cuz," though when you listen, the name sounds more like "cul" (you can hear the arrestee's side of the call, you just can't hear the unidentified call-recipient). There are continual references in the case to "Malcolm." There was an 'erroneous' photo in evidence for a year. Had counsel been allowed to obtain more prison-phone-call recordings as requested, we may have heard the deal-making inmate referring to one particular caller as "cuz" or "cul." In that event, we would know without a doubt that the wrong man has been convicted.

---

[14]The entire body of evidence consists of: the doubtful ID by the two impeached and deal-making inmates, chronic references to prior convictions, the prosecutor's sarcasm and the baffling opinion of the agent. That's it---that was the entire case. Why then the conviction? Both the agent and the prosecutor vouched for the guilt of the defendant and for the veracity of the two deal-making conspirators---to the jury(!)But this Petition for Rehearing will address the singular issue pursuant to Rule 44.

This conviction was based on non-credible inmate testimony, incredible agent testimony and intentional abuse of prior convictions. The culmination of this conviction-campaign ended with the prosecution's desired verdict but an opportunistic perfidiousness to evidence.

One criteria governing the exercise of discretion in granting or denying certiorari is whether the jury function in passing on disputed questions of fact and in drawing inferences from proven fact has been disrespected because they were misled, caused to believe their decision had already been made for them and repeatedly led to believe there was incriminating evidence outside their presence. Marshall v. United States, 360 U.S. 310 (1959) jurors so prejudiced as to warrant the exercise of this Court's supervisory power.

If this had been a trial for the murder of John Doe, and John Doe walked into the courtroom, the jury still would have convicted Petitioner for homicide---it was that prejudicial from beginning to end.

CONCLUSION

For the reasons stated above-- the colossal misunderstanding of, and prejudicial effect of, the "phone call" (sic) exhibit admitted into evidence, Petitioner respectfully requests this Honorable Court grant the Petition for Rehearing and address the issues which prejudicially poisoned the jury against the Petitioner in the trial below. Here, the

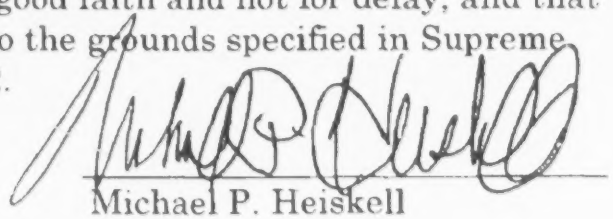
benefits of providing guidance concerning the proper application of FRE Sec. 701 justifies this Court's time on this case (just as *Kumho* justified the Court's time on FRE Sec. 702). We need a universal rule requiring *express* use of discretion when admitting layperson opinion.

Respectfully submitted,

MICHAEL P. HEISKELL
Counsel of Record
JOHNSON, VAUGHN & HEISKELL
5601 Bridge Street, Ste. 220
Fort Worth, Texas 76112
Phone: 817 457-2999
ATTORNEY FOR PETITIONER
mheiskell@johnson-vaughn-heiskell.com

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.



Michael P. Heiskell